(3)

No. 01-1411

Supreme Court, U.S.
FILED
APR 24 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

COMMONWEALTH EDISON COMPANY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF AS *AMICUS CURIAE* OF THE COMMITTEE ON ENERGY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF THE PETITION

Charles M. Pratt
Counsel of Record
Dickstein Shapiro Morin
& Oshinsky LLP
1777 Avenue of the Americas
New York, New York 10036-2714
(212) 835-1400

Sarah Barish-Straus
Chair of the Committee on Energy
of The Association of the Bar of
the City of New York
42 West 44th Street
New York, New York 10036
(973) 541-0637

April 24, 2002

19 pp

TABLE OF CONTENTS

Table of Authorities ii

Statement of Interest 1

Reasons for Granting the Writ 2

A. In assessing the constitutionality of EPACT, the actual funding scheme provided for by Congress must be taken into account, particularly the express provision that targets utility ratepayers as the source of $2.25 billion in retrospective assessments. 2

B. In construing the constitutionality of EPACT by analogy to CERCLA, the Federal Circuit's decision would expand vicarious environmental remediation responsibility to tertiary third parties: the customers of the customers of the party solely responsible for environmental damage, in this instance the Government. 9

C. The Government's direct economic self-interest in shedding itself of uranium enrichment enterprise facility retirement costs incident to the privatization of that merchant enterprise should be accorded considerable significance in assessing the constitutionality of EPACT. 15

Conclusion 17

TABLE OF AUTHORITIES

FEDERAL CASES

Armstrong v. United States, 364 U.S. 40 (1960)..... 12

Cities Servs. Co. v. McGrath, 342 U.S. 330 (1952)..... 12

Commonwealth Edison Co. v. United States, 271 F.3d 1327 (Fed. Cir. 2001)..... passim

Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993)..... 3

Concrete Sales & Servs., Inc. v. Blue Bird Body Co., 211 F. 3d 1333 (11th Cir. 2000)..... 11

Connolly v. PBGC, 475 U.S. 211 (1986)..... 7

Crocker v. United States, 125 F.3d 1475 (Fed. Cir. 1997)..... 3

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978)..... 3

Eastern Enters. v. Apfel, 524 U.S. 498 (1998)..... 6, 7, 14

Florida Rock Indus. v. United States, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987)..... 3

General Elec. Co. v. AAMCO Transmissions, Inc., 962 F. 2d 281 (2nd Cir. 1992)..... 11

Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1948)..... 5

Hodel v. Irving, 481 U.S. 704 (1987)..... 3

In re Chateaugay Corp., 53F.3d 478 (2d Cir.), *cert. denied, LTV Steel Co. v. Shalala*, 516 U.S. 913 (1995)..... 4

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Reg., 496 U.S. 18 (1990) 5, 7

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)..... 11

United States v. Aceto Agric. Chem. Corp., 872 F. 2d 1373 (8th Cir. 1989)..... 11

United States v. Carlton, 512 U.S. 26 (1994) 7

United States v. Darusmont, 449 U.S. 292 (1981)..... 7

United States v. Shell Oil Co., 2002 U.S. App. LEXIS 2188 (9th Cir. Feb. 11, 2002)..... 11

United States v. Winstar Corp., 518 U.S. 839 (1996).... 14

Yeskoo v. United States, 101 F.3d 715 (Fed. Cir. 1996) 3

FEDERAL STATUTES

Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq..... 8, 11, 12, 14

Energy Policy Act of 1992 ("EPACT"), 42 U.S.C. § 2297g et seq..... 3, 4, 13, 14

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH EDISON COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF AS *AMICUS CURIAE* OF THE COMMITTEE ON ENERGY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF THE PETITION

Statement of Interest

The Committee on Energy (the "Committee") of The Association of the Bar of the City of New York (the "Association") files this brief as *amicus curiae* urging that the petition for a writ of certiorari be granted.[1]

The Committee is one of the standing committees of the Association, a voluntary bar association with more than 20,000 members. Since its inception, the Committee, established to report on matters relating to energy, has actively participated in the consideration, development and

---

[1] Written consents to the filing of this brief *amicus curiae* were provided by the parties and submitted to the Court in conjunction with this filing. No counsel for a party authored the brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

interpretation of much of the legislation and regulation pertaining to the field of energy. The November 20, 2001 decision of the Federal Circuit involves a determination whether $2.25 billion in retrospective assessments imposed on the ratepayers of domestic nuclear utilities by the Energy Policy Act of 1992 can be reconciled with the Due Process and Takings Clauses of the Fifth Amendment as construed by this Court and other Circuits.

This case presents important social and legal issues within the Committee's sphere of responsibility, in that it determines in a direct and substantial way the extent to which the basic pricing mechanism for retail electric service may be constitutionally made vulnerable to severely retroactive assessment programs imposed by Congress which significantly increase the price consumers are required to pay for decades-old use of electricity. This case also establishes whether Congress may permissibly impose vicarious, tertiary third-party liability on utility ratepayers for past environmental damage caused directly by the Government itself at Government facilities in transactions distinct from the generation of electricity. Accordingly, an *amicus curiae* brief is desirable to ensure that the important issues at stake are fully developed for the Court's review.

Reasons for Granting the Writ

A. In assessing the constitutionality of EPACT, the actual funding scheme provided for by Congress must be taken into account, particularly the express provision that targets utility ratepayers as the source of $2.25 billion in retrospective assessments.

The decontamination and decommissioning ("D&D") special assessment created by the Energy Policy

Act of 1992 ("EPACT"), 42 U.S.C. § 2297g et seq., requires that $150 million be collected annually for a period of fifteen years exclusively from domestic nuclear utilities that had previously purchased enriched uranium in arm's length transactions with the government. In some instances, the commercial purchases of enrichment services subject to the assessment reach back more than forty (40) years to the 1950s. Although the assessments are imposed upon the utilities, EPACT expressly provides that ratepayers are ultimately responsible for paying these costs. Indeed, EPACT renders State regulatory agencies powerless to prevent the pass-through of the assessments. At the end of the program's fifteen years aggregate EPACT D&D exactions from ratepayers will have reached $2.25 billion.

Even assuming, arguendo, that the Federal Circuit had jurisdiction to hear and determine Due Process and Takings Clause objections to the constitutionality of the EPACT D&D assessments,[2] and further assuming that that

---

[2] There are substantial questions whether the Court of Federal Claims or the Court of Appeals for the Federal Circuit, as Article I legislative courts, are possessed of the same constitutional authority as Article III courts to determine the validity of Congressional legislation and, in appropriate circumstances, find that legislation is constitutionally infirm. The Committee is unaware of any authority supporting the jurisdiction of these courts to entertain claims that an enactment of Congress is unconstitutional other than in connection with a claim for money damages against the United States, and it appears that this is the first case to do so. This Court has frequently held that jurisdiction to determine the constitutionality of federal statutes lies with the district courts. See, e.g., *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993); *Hodel v. Irving*, 481 U.S. 704 (1987); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978). Until the issuance of its decision in this case, the Federal Circuit has agreed. See *Crocker v. United States*, 125 F.3d 1475 (Fed. Cir. 1997); *Florida Rock Indus. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); *Yeskoo v. United States*, 101

court correctly formulated and applied appropriate tests in order to assess constitutionality, its analysis failed from the very outset either to acknowledge the totality of the EPACT statutory scheme or to assess the constitutionality of the Act with respect to all of the appropriate parties. EPACT sets forth very specific provisions as to how assessments are to be collected. The parties directly targeted by Congress as ultimately responsible for payment of the D&D assessments are utility ratepayers, and, therefore, *their* status and interests must be considered for purposes of evaluating the constitutionality of EPACT under the Due Process and Takings Clauses.

EPACT provides in pertinent part that a special assessment shall be "collect[ed]" from domestic utilities, 42 U.S.C. § 2297g-1(c), and that "[a]ny assessment levied under this section ... shall be fully recoverable in rates in all jurisdictions ...," 42 U.S.C. § 2297g-1(g). Although the Federal Circuit explicitly acknowledged EPACT's ratepayer payment requirement, and even pronounced that it was "binding on state regulatory agencies," in assessing the constitutionality of the special assessments the fact that EPACT provides the $2.25 billion in special assessments will be paid entirely by *ratepayers* was inexplicably ignored.

F.3d 715 (Fed. Cir. 1996). Nonetheless, the Federal Circuit began its *en banc* decision below by stating that "[t]his is one of a large number of cases brought in the Court of Federal Claims challenging the constitutionality of the Energy Policy Act of 1992...." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1329 (Fed. Cir. 2001). On this threshold matter of the jurisdictional basis for the Court of Federal Claims to entertain due process claims, the decision in *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), *cert. denied*, *LTV Steel Co. v. Shalala*, 516 U.S. 913 (1995), reaches a different conclusion as to Court of Federal Claims jurisdiction.

The fact that EPACT expressly targets ratepayers was given no consideration in the Federal Circuit's analysis of the constitutionality of EPACT.[3] Instead, the Federal Circuit proceeded to apply novel Due Process and Takings Clause tests of its own creation exclusively to the *utility*, Commonwealth Edison, rather than to Commonwealth's *ratepayers* as clearly provided by EPACT. The court's failure to treat EPACT and its explicit financing scheme as an integral statute produced an entirely different, and erroneous, constitutional analysis that should receive the careful scrutiny of this Court.

The Federal Circuit's disregard of the critical statutory feature specifying who bears responsibility for paying the special assessments was crucial to the court's

---

[3] Commonwealth's standing to contest the EPACT special assessments was appropriately not questioned in the Federal Circuit's decision. Commonwealth alleged damages from EPACT that were unique to it alone, including damage to its competitive standing in electric markets compared to other utilities who bear no EPACT obligations. Moreover, as a technical matter, the liability for the assessments falls *prima facie* on Commonwealth. Under the precepts of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1948), Commonwealth's "injury was complete when it paid the excessive [assessments]," and "the mere payment of an improper charge constituted a prima facie case of injury and damage." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Business Reg.*, 496 U.S. 18 (1990), confirmed that neither a plaintiff's standing to challenge an assessment as unconstitutional nor its right to recover a refund of such assessment were affected by opportunities to collect some or all of the assessments from customers. In the circumstances here, were the EPACT special assessments finally to be overturned as unconstitutional, either Congress' own provision for rate treatment at 42 U.S.C. § 2297g-1(g) and/or the operation of state rate-regulatory authority in unwinding the assessments would function to benefit the EPACT special assessment ratepayer-payors.

constitutional inquiry, and should have produced vastly different results. Were the court to have applied each of the test elements it had itself identified to the ratepayers who represent the sole source of the assessments, rather than to the utility, then entirely different conclusions as to the consistency of EPACT with Due Process and the Takings Clause would have been reached.

By looking to this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Federal Circuit concluded that legislation creating severely retroactive assessments could be justified in those instances where, based upon the history of the relationship between the parties, "expectations of future benefits had been created," and that "the obligation to pay benefits could not be imposed on [entities] that had no role in creating those expectations." *Commonwealth Edison*, 271 F.3d at 1343. In this instance, the only role occupied by Commonwealth's ratepayers is that of present and future consumers of electrical service. It is beyond dispute that such ratepayers are complete strangers to all enriched uranium transactions with the Government.

Surely ratepayers could have had no role whatsoever in creating any governmental expectation that *they* would relieve plant retirement and cleanup costs occurring at the Government's own facilities. Furthermore, Commonwealth Edison's ratepayers throughout the fifteen-year special assessment payment period were certainly not "benefited from the government's operation of the uranium enrichment facilities," *Id.* at 1342, and indeed many of Commonwealth's ratepayers now saddled with paying the

special assessments were not even alive when the transactions forming the basis for the assessments began in the 1950s.[4]

Another constitutionality test applied by the court below, whether imposition of retroactive liability was "contrary to that party's reasonable expectations," *Id.* at 1346, provides no greater support for the decision. Among the sub-elements of this test identified by the Federal Circuit were whether the problem addressed by the assessments was known at the time the activity was engaged in, and whether the subsequent assessments could have been reasonably anticipated. *Id.* at 1349. Posing such questions to the appropriate (and only) assessment obligor designated by Congress in EPACT -- ratepayers -- can only result in the

---

[4] The Committee does not question the constitutionality of legislation having only limited and circumscribed retrospective application, such as to cover a lapse in an expired statutory authorization, to create a transition between tax or rate years, or for similar reasons that have a rational basis, are expressly delineated, and capable of individualized judicial evaluation. In *Connolly v. PBGC*, 475 U.S. 211, 224 (1986), this Court characterized Takings Clause evaluation of retroactive legislation as requiring "factual inquiries into the circumstances of each particular case." Following such analyses, the constitutionality of legislation with relatively brief retrospectivity is properly upheld. All of the Justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), found the period of retroactivity to be of constitutional significance, consistent with the Court's prior decisions such as *McKesson Corp. v. Div. of Alcoholic Beverages*, 496 U.S. 18, 41 (1990), where the Court noted that "beyond some temporal point the retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limitation.'" The amount involved here -- $2.25 billion -- and the period of retrospectivity -- assessments on 1950s transactions due in 2007 -- far exceed the "customary congressional practice" of enacting revenue-generating legislation "confined to short and limited periods required by . . . practicalities," a standard upheld in *United States v. Carlton*, 512 U.S. 26 (1994), citing *United States v. Darusmont*, 449 U.S. 292 (1981). It is in such a context that the Committee urges review on certiorari.

conclusion that the assessments violate Due Process under the very standards articulated by the Federal Circuit.

Indeed, every test, factual inquiry and standard applied by the Federal Circuit in concluding that $2.25 billion in EPACT special assessments do not offend the Due Process or Takings Clauses produces a different outcome when the express funding provisions mandated by EPACT are acknowledged and the constitutional interests of the parties who are the source of the assessments -- ratepayers -- are recognized. The fundamental, studied misconception of the provisions of EPACT utilized by the Federal Circuit and the quite different conclusions as to constitutionality that are reached when EPACT is viewed as an integral statute warrant the review of this Court.

B. In construing the constitutionality of EPACT by analogy to CERCLA, the Federal Circuit's decision would expand vicarious environmental remediation responsibility to tertiary third parties: the customers of the customers of the party solely responsible for environmental damage, in this instance the Government.

A significant justification relied upon by the Federal Circuit to uphold the constitutionality of EPACT's $2.25 billion in special retrospective assessments was the so-called "polluter pays" principle arising under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq. In the Committee's view, a grant of certiorari need not be accompanied by a review of CERCLA. Rather, the Federal Circuit misapprehended the uncontroverted facts of the enriched uranium purchase transactions here involved in its attempt to place them in a CERCLA setting. A properly

conducted CERCLA analysis would not yield the conclusions or support the results reached below.

Overlooking the assertions of Commonwealth Edison that the utility had exercised no dominion, control or influence over the Government's production processes and practices at its uranium enrichment facilities, and that these facilities had long ago been fully contaminated by prior production of nuclear weapons, the Federal Circuit concluded that the mere purchase of enriched uranium from the Department of Energy by the utility subjected its ratepayers to special assessment liability.

In so ruling, the court below completely disregarded the acknowledgment by the Government that the assessments are "not premised upon any responsibility for contamination." Gov't C.A. Br. at 31. Instead, three factors were deemed to be determinative of a sufficient degree of anticipation that $2.25 billion in special assessments would be forthcoming in order to sustain their validity: the subjective views of the *utility* as to a) the foreseeability of its subsequent liability for cleanup costs, b) the inclusion of such costs in the contract price for enriched uranium, and c) awareness of the Government's waste disposal methods.

The court's silence on these factors as they pertain to Commonwealth's *ratepayers* is notable. Nowhere are the indicia of awareness of the potential for subsequently arising pollution cleanup liability attributed to those parties *ultimately responsible* for the special assessments, even deeming the assessments as the equivalent of CERCLA liability.

The parties obligated to supply all $2.25 billion in special assessments -- ratepayers -- possess none of the

transactional awareness or capability for anticipation of subsequent liability deemed determinative by the Federal Circuit. The sole basis for imposing this liability on them is their use of electricity through the year 2007. The Federal Circuit's logic thus pronounces a wholesale expansion of CERCLA-type liability by making strangers to the transactions presumed to have created environmental harm (and the basis for the $2.25 billion in special assessments) not merely indirectly responsible, but *solely* responsible for *all* environmental remediation costs allegedly relating to those transactions.

After giving full recognition to the funding arrangements mandated by Congress in enacting EPACT, the court's decision below can therefore be viewed in no other way than upholding conclusive tertiary third party liability for the customers of the customers of the polluter, who in this instance was the Government itself. This liability attaches without any provision for fact-finding related to the circumstances of the environmental harm. Furthermore, such liability is final, unreviewable and vicarious, and it is also exclusive. Such an astonishing expansion of environmental remediation liability, and its imposition solely on complete strangers to the underlying transactions, should receive the most careful scrutiny in accordance with this Court's prior Due Process and Takings Clause decisions.

The Federal Circuit's CERCLA analogy is flawed from the perspective of well-established Takings Clause principles as well. Central to the court's logic was that "the imposition of an obligation to pay money does not constitute an unconstitutional taking of property," *Commonwealth Edison*, 271 F.3d at 1340. Commonwealth replied that what was really "taken" were rights of contribution and indemnification against the Government in its capacity as sole

owner and operator of the uranium enrichment facilities. In the court's own words, "Edison argues that both under CERCLA and the common law, in a suit between the responsible parties, liability would be allocated between those responsible parties according to their relative contributions [to creation of the environmental problem]," *Id.* at 1356.

In any meaningful sense, and according full significance to the court's CERCLA analogy, it is the utility's cause of action against the Government as facility operator to establish its own lack of culpability that has been "taken" by EPACT.[5] Under EPACT, $2.25 billion in assessments to

---

[5] The court misapprehended CERCLA liability as well. This Court has explained that CERCLA liability is intended "to impose[] the costs of cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989). CERCLA creates potential liability for the "owner" and "operator" of facilities where hazardous substances are created, as well as the "arrange[r]" and "transporter" of hazardous substances undergoing disposal or treatment, see 42 U.S.C. § 9607(a). Neither Commonwealth Edison nor the electric customers of Commonwealth are potentially responsible parties under CERCLA. Until now, no court has suggested that potential CERCLA liability may arise from the mere purchase of goods (which are not themselves undergoing environmental remediation) produced at a facility where hazardous substances were created. Numerous circuits have held that in the absence of actual control over the manufacturing process leading to creation of hazardous substances, or ownership of the substances being produced ("work in progress"), CERCLA does not impose customer liability, *see United States v. Shell Oil Co.*, 2002 U.S. App. LEXIS 2188 (9th Cir. Feb. 11, 2002); *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F. 2d 281 (2nd Cir. 1992); *Concrete Sales & Servs., Inc. v. Blue Bird Body Co.*, 211 F. 3d 1333 (11th Cir. 2000). In the principal case relied upon by the Federal Circuit, *United States v. Aceto Agric. Chem. Corp.*, 872 F. 2d 1373 (8th Cir. 1989), the defendant at all times owned the hazardous substance-creating work in progress.

fund retirement costs at the Government's enrichment facilities become due and owing with no recourse and without any regard to the payors' past conduct.

A cause of action is "property" within the meaning of the Fifth Amendment, *Cities Servs. Co. v. McGrath*, 342 U.S. 330, 335-36 (1952), and a statute expunging such a legal right and sequestering it for the Government's own benefit is a classic constitutional Taking, *see Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here."). The Federal Circuit's construction of this central feature of EPACT as a mere obligation to pay money is irreconcilable with the functional result of EPACT to deprive Commonwealth of not only all opportunities for

---

Moreover, CERCLA itself *requires* that there be an allocation of environmental remediation costs among responsible parties, 42 U.S.C. §§ 9607(e)(2) and 9613(f). In the enriched uranium purchase transactions upon which EPACT premises Commonwealth Edison's special assessment liability, it is clear that Commonwealth had no cognizable relationship with either the hazardous waste in question or the "work in progress" at the Government's facilities, nor did the utility have familiarity with or influence over the operation of those facilities. All such factors were in the Government's exclusive dominion and control. Commonwealth Edison's ratepayers were further removed still. Since the Federal Circuit precludes *any* opportunity for Commonwealth to establish either for itself or its ratepayers that the Government, as sole owner and operator of the enrichment facilities and the work in progress, should bear CERCLA responsibilities, that result is *completely contrary to*, rather than supported by, CERCLA.

liability-shifting, but also express statutory CERCLA rights upon which the court's analysis presumes to rely.[6]

C. The Government's direct economic self-interest in shedding itself of uranium enrichment enterprise facility retirement costs incident to the privatization of that merchant enterprise should be accorded considerable significance in assessing the constitutionality of EPACT.

The Federal Circuit accorded no significance to the context in which EPACT arose, or that a principal purpose of the legislation was to facilitate the privatization of the Government's uranium enrichment enterprise to the privately-owned, for-profit United States Enrichment Corporation ("USEC"). The very same EPACT that created $2.25 billion in special assessments to be paid entirely by ratepayers was also expressly intended by Congress to create and enable the private company USEC "to operate as a business enterprise on a profitable and efficient basis," and to "maximize the long-term value of [USEC] to the Treasury of the United States." 42 U.S.C. § 2297g and g-1, App. 101a-103a. Although the Federal Circuit relied upon CERCLA analogies to uphold EPACT, under CERCLA subsequent buyers of an enterprise become potentially responsible for environmental

---

[6] The court below was by no means unaware of the necessary implications or consequences of its ruling to environmental remediation liability. The Federal Circuit noted that "[the utilities'] liability may be passed on to the customers of the utilities to the extent that the utilities' rates are established by traditional rate-making," *Commonwealth Edison*, 271 F.2d at 1356-57, and rather than treating this integral provision of the statute as a significant element of its constitutional analysis, instead found it to be a *salutary* feature of EPACT *supporting* its constitutionality.

remediation expenses, 42 U.S.C. §. 9607(a)(1). Nonetheless, EPACT relieves USEC from such liabilities *entirely*, 42 U.S.C. § 2297g-2(c).

The significance of the articulated objective of EPACT to spin off the Government's uranium enrichment business while simultaneously exculpating the buyer from incurring any environmental remediation costs cannot be disregarded in evaluating whether the imposition of special assessments is constitutional, or whether this factor may have comprised an inappropriate motive that guided the terms of the legislation. In *Eastern Enterprises*, Justice Kennedy pointed out that "[g]overnmental self-enrichment" was a significant factor in determining whether a "taking" existed. 524 U.S. at 544. Justice Souter, with three other Justices concurring, said in *United States v. Winstar Corp.*, 518 U.S. 839, 898 (1996), that "The greater the Government's self-interest, ... the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence...."

In this proceeding the circumstances are particularly egregious inasmuch as ratepayers, instead of either the Government's divestiture or enriched uranium contracting partners, represent the entire source of the $2.25 billion to be collected. The very same statute that facilitated a private sale of one of the Government's commercial enterprises with the stated purpose of maximizing value to the Treasury also happened to create an entirely new, enormous financial obligation imposed exclusively on a precisely delineated category of parties -- the ratepayers of nuclear utilities. Previous to EPACT these parties were complete strangers to the enriched uranium transactions, and at no time had any interest in privatization. The confluence of these two features in the same statute, which the Federal Circuit

found to be of *no significance whatsoever*, should instead be entitled to the most careful consideration for its relevance to whether EPACT can withstand Due Process and Takings Clause challenges.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

Sarah Barish-Straus
Chair of the Committee on Energy of The Association of the Bar of the City of New York
42 West 44th Street
New York, New York 10036
(973) 541-0637

Charles M. Pratt
Dickstein Shapiro Morin & Oshinsky LLP
1177 Avenue of the Americas
New York, NY 10036-2714
(212) 835-1400
Counsel of Record

April 24, 2002